No. 06-341

In the Supreme Court of the United States

BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, based on the alleged bias of a subordinate employee, where the subordinate employee did not take the adverse employment action himself but did influence the decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 450 F.3d 476. The memorandum opinion and order of the district court (Pet. App. 32a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2006. The petition for a writ of certiorari was filed on September 5, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a claim that petitioner racially discriminated against one of its employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e

et seq. The district court granted summary judgment to petitioner. Pet. App. 32a-76a. The court of appeals reversed and remanded. *Id.* at 1a-31a.

1. Stephen Peters, who is black, worked as a merchandiser for petitioner, a bottling company, at its facility in Albuquerque, New Mexico. Peters was responsible for the placement of petitioner's products at retail outlets such as grocery stores. Peters was supervised on a day-to-day basis by Jeff Katt, a white account manager, but reported directly to Cesar Grado, a Hispanic district sales manager. Although Grado was responsible for evaluating Peters and other employees, he had no authority to terminate or discipline employees under his supervision; those decisions were instead taken by petitioner's human resources department. Sherry Pedersen was the highest-ranking human resources officer at petitioner's Albuquerque facility; her supervisor, Pat Edgar, was based at petitioner's facility in Phoenix. Pet. App. 2a-3a, 33a-36a.

On Friday, September 28, 2001, Grado contacted Katt and ordered him to direct Peters to work on the following Sunday. When Katt passed along the order, Peters informed him that he could not work on Sunday because he had other plans. Katt then informed Grado that Peters could not work on Sunday. Grado later said that Katt also told Grado that Peters had said that he "might call in sick"; Peters and Katt, however, both denied that Peters said anything about being sick during that conversation. That afternoon, Grado contacted Edgar to ask whether he could order Peters to come to work on Sunday. Edgar advised Grado to "find out what the situation was," and, unless Peters had a "compelling reason" not to come to work, to order him to work on Sunday. Edgar told Grado to inform Peters that failure

to comply with that order would constitute insubordination that could lead to termination. Pet. App. 3a-4a, 37a-40a.

Grado then contacted Peters. When Grado asked Peters to work on the following Sunday, Peters again said that he had other plans. According to Peters, he also told Grado that he had not been feeling well all week. Grado claimed that he asked Peters what his plans were and that Peters angrily responded that his plans were "none of [Grado's] business"; Peters, however, denied that Grado asked about his plans. It is undisputed that Grado then ordered Peters to work on Sunday and informed him that failure to comply with that order would constitute insubordination that could lead to termination; it is also undisputed that Peters told Grado, "[D]o what [you] got to do and I'll do what I got to do." Grado again contacted Edgar and relayed his version of the conversation with Peters; Edgar determined that Peters' conduct in that conversation, standing alone, amounted to insubordination, but made no decision that afternoon to take action against Peters. Pet. App. 5a, 40a-41a.

On the evening of Saturday, September 29, Peters canceled his plans for the following day and went to an urgent-care clinic. A doctor diagnosed him with a sinus infection, gave him a prescription, and directed him not to return to work until the following Monday. Peters then phoned Katt and informed him that he probably could not work on Sunday because of illness. Katt told Peters that "he didn't have any problem with that." Pet. App. 6a. Katt attempted to reach Grado to inform him that Peters had called in sick, but was unable to do so. *Id.* at 5a-6a, 39a, 43a.

On Monday, October 1, Peters returned to work. During the day, Grado conferred repeatedly with Pedersen and Edgar concerning Peters' conduct. Pedersen pulled Peters' personnel file and determined that Peters had previously received a suspension and a "final warning" for insubordination from a different supervisor after refusing to work on his day off. The file did not indicate that Peters' reason for refusing to work was that the funeral for his fiancee's son (whom he had raised as his own) was scheduled for the day in question, and that the supervisor had told Peters that the funeral was no excuse because the deceased "was not your biological son." Pet. App. 6a-7a, 42a-44a.

Late in the day on Monday, Edgar decided to terminate Peters for insubordination. Edgar later stated that she based her decision primarily on Peters' conduct toward Grado on the preceding Friday. Although Edgar claimed that she had already learned that Katt had excused Peters from coming to work on Sunday (and that that information did not affect her decision), Katt stated that he did not inform Grado that Peters had phoned in sick until a conversation on Monday evening. According to Katt, Grado told him, "I think I'm going to terminate [Peters]," but, when Katt informed Grado that Peters had phoned in sick, Grado "kind of paused" and said, "Why didn't you tell me that earlier?" Pet. App. 7a-8a, 44a-45a.

On Tuesday, October 2, Peters was called to a meeting with Grado and Pedersen. Grado informed Peters that he was being terminated for his failure to report to work on the preceding Sunday. Peters was then presented with a written termination notice, which confirmed that he was being terminated for his failure to report to work. Peters protested, stating that no one at

the meeting had asked why he had not reported to work; that he had not reported to work because he was sick; and that Katt had given him permission not to report. Peters later said that, after he explained his absence, "they all got quiet," and that, "when I left[,] they shut the door and was in there talking." Pet. App. 9a. Shortly after the meeting, Pedersen called Edgar and asked whether she knew Peters was black; while Peters' race was noted in several documents in his personnel file, Pedersen appears not to have learned of his race when she reviewed the file. Edgar later stated that race "played no part whatsoever" in her decision to terminate Peters. *Id.* at 8a-9a, 45a-46a.

There was substantial evidence that Grado had treated Hispanic employees more leniently than he treated Peters. On one occasion, Grado ordered Katt to direct Monica Lovato, a Hispanic merchandiser, to work on a weekend. Lovato informed Katt that it was her birthday that weekend and subsequently failed to show up to work as directed. When Grado was informed that Lovato had disobeyed the order to report to work, he remarked, "You can't make somebody work one of their days off." Pet. App. 11a. Lovato was not disciplined as a result of the incident. Three other merchandisers, two black and one Hispanic, stated that Grado treated black employees worse than other employees. There was also substantial evidence that Grado made racially demeaning comments and jokes about blacks. Katt stated that Grado may have used the word "nigger," or a comparable racial epithet, to describe Peters after his termination. *Id.* at 10a-11a, 23a-26a, 46a-47a.

2. After Peters filed a timely charge of racial discrimination, respondent brought this enforcement action against petitioner in the United States District Court for

the District of New Mexico, contending that, because Grado was racially biased and influenced the decision to terminate Peters, petitioner was liable for racial discrimination in violation of Title VII.

The district court granted summary judgment to petitioner. Pet. App. 32a-76a. The court determined that, under the burden-shifting framework of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), respondent had failed to create a genuine issue of material fact with regard to whether the reasons offered by petitioner for Peters' firing were pretextual. Pet. App. 55a-75a. The court did determine that respondent had "created a genuine issue of fact whether Grado was biased against African Americans." *Id.* at 71a. The court reasoned, however, that Edgar, rather than Grado, had made the decision to terminate Peters, and rejected respondent's contention that Edgar had acted as a "rubber stamp" for Grado's prejudice. *Id.* at 66a. The court noted that, "[i]n this case, Grado did not make any recommendations to Edgar," and added that "Edgar attempted to do at least some independent investigation by consulting with Pedersen regarding Peters' disciplinary history." *Id.* at 66a-67a. The court also concluded that respondent had failed to "direct[] the Court's attention to any evidence in the record linking Grado's potential bias to his decision to involve Edgar in the situation with Peters." *Id.* at 67a.

3. The court of appeals reversed and remanded. Pet. App. 1a-31a.

Like the district court, the court of appeals reasoned that "[t]he sole issue * * * is whether [respondent] has made a sufficient showing that [petitioner's] proffered explanation is a pretext for race discrimination." Pet. App. 14a. The court of appeals noted that "it is undis-

puted that Ms. Edgar, who formally made the termination decision, * * * had no idea that Mr. Peters is black" and "therefore could not have acted for racially discriminatory reasons." *Ibid.* Thus, the court reasoned, respondent was required to show not only that "Mr. Grado harbored racial animus toward black employees," but also that "his racial animus should be imputed to [petitioner] despite the fact that Mr. Grado had no power to terminate anyone." *Ibid.*

The court of appeals noted that, while it had not previously addressed the question, other courts had "overwhelmingly" recognized claims under Title VII based on the bias of a subordinate employee. Pet. App. 15a. The court reasoned that imposing liability based on subordinate bias not only "comport[s] with the basic agency principles incorporated by statute into Title VII," *id.* at 16a, but also "advances the purposes of Title VII," *id.* at 17a. The court noted that liability for subordinate bias would "encourag[e] employers to verify information and review recommendations before taking adverse employment actions against members of protected groups." *Ibid.*

The court of appeals then explained that, "[d]espite broad support for some theory of subordinate bias liability, our sister circuits have divided as to the level of control a biased subordinate must exert over the employment decision." Pet. App. 18a. The court noted that "[s]ome courts take a lenient approach, formulating the inquiry as whether the subordinate 'possessed leverage, or exerted influence, over the titular decisionmaker.'" *Ibid.* (quoting *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000)). "At the opposite extreme," the court observed, "the Fourth Circuit has held that an employer cannot be held liable even if a biased

subordinate exercises 'substantial influence' or plays a 'significant' role in the employment decision." *Id.* at 19a (citing *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 291 (4th Cir. 2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005)). Under that approach, the court explained, any employer can be held liable only if "the decisionmaker [was] so completely beholden to the subordinate 'that the subordinate is the actual decisionmaker.'" *Id.* at 20a (quoting *Hill*, 354 F.3d at 290).

The court of appeals ultimately concluded that the correct inquiry was whether "the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action." Pet. App. 20a-21a. The court rejected the Fourth Circuit's approach on the ground that it excessively focused on the identity of the "decisionmaker" and would "allow[] employers to escape liability even when a subordinate's discrimination is the sole cause of an adverse employment action, on the theory that the subordinate did not exercise complete control over the decisionmaker." *Id.* at 20a. The court emphasized that, under its approach, "an employer can avoid liability by conducting an independent investigation of the allegations against an employee" and that "simply asking an employee for his version of events may defeat the inference that an employment decision was racially discriminatory." *Id.* at 21a.

Applying its standard for subordinate-bias liability, the court of appeals determined that respondent had presented sufficient evidence to survive summary judgment. Pet. App. 22a-31a. The court of appeals first agreed with the district court that respondent "has raised a genuine issue of fact concerning Mr. Grado's racial animus." *Id.* at 23a. Although the court of ap-

peals did not "necessarily believe that each of the incidents [identified by respondent] would support a charge of discrimination in isolation," it concluded that, "taken as a whole, this evidence of racial comments and disparate treatment of black merchandisers creates a genuine issue of fact regarding Mr. Grado's racial bias." *Id.* at 26a. The court then concluded that respondent had also created a genuine issue of fact as to whether "Mr. Grado's bias translated into discriminatory actions that caused Mr. Peters' termination." *Ibid.* The court reasoned that, "[i]f a jury credits the testimony of Mr. Peters and Mr. Katt, and thus concludes that Mr. Grado lied to Ms. Edgar, it could also find that the additional claims about Mr. Peters' conduct caused the termination." *Id.* at 30a. Finally, the court rejected the argument that Edgar had conducted an independent investigation that defeated the inference that Grado's bias tainted the decision to discharge Peters. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-17) that there is a conflict among the courts of appeals concerning the appropriate standard for subordinate-bias liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Although there is a circuit conflict on that issue, that conflict is not as extensive as petitioner asserts. In any event, this case would constitute a poor vehicle for resolution of that conflict because it arises in an interlocutory posture (and it is therefore unclear whether resolution of that conflict would affect the outcome of this case). Further review is therefore unwarranted.

1. Under Title VII, it is unlawful for an employer, *inter alia*, to "discharge any individual * * * because of such individual's race." 42 U.S.C. 2000e-2(a)(1). All

of the courts of appeals to have considered the issue have held that an employer can be liable under Title VII (or other similarly worded federal discrimination statutes) based on the alleged bias of a subordinate employee: *i.e.*, an employee who did not personally take the adverse employment action. See Pet. App. 15a (citing cases). In determining whether an employer should be held liable on a theory of subordinate bias, most of the courts of appeals, like the court of appeals in this case, have focused on the causal connection between the alleged bias and the adverse employment action. See, *e.g.*, *Stimpson* v. *City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999) (noting that "the plaintiff must prove that the discriminatory animus behind the recommendation * * * was an actual cause of the other party's decision to terminate the employee"), cert. denied, 529 U.S. 1053 (2000); *Wilson* v. *Stroh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (stating that "[t]he determinative question is whether [the plaintiff] has submitted evidence that [the subordinate employee's] racial animus was a cause of the termination").

To be sure, those courts of appeals have phrased the relevant inquiry in various ways, such as whether the subordinate employee had "influence" on the decisionmaking process, see, *e.g.*, *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 286 (3d Cir. 2001); *Santiago-Ramos* v. *Centennial P.R. Wireless Corp.*, 217 F.3d 46, 55 (1st Cir. 2000); *Griffin* v. *Washington Convention Ctr.*, 142 F.3d 1308, 1310 (D.C. Cir. 1998), or whether the subordinate employee was "involved" in that process, see, *e.g.*, *Bergene* v. *Salt River Project Agric. Improvement & Power Dist.*, 272 F.3d 1136, 1141 (9th Cir. 2001); *Stacks* v. *Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1323 (8th Cir. 1994). But the

thrust of the inquiry under any of those formulations is whether there was a causal connection between the alleged bias and the adverse employment action.

While petitioner contends that those courts "widely differ[]" on the appropriate standard for subordinate-bias liability, Pet. 14, and while the court below criticized the formulations of some of those courts as excessively "lenient," Pet. App. 18a-19a, those courts do not appear to be in genuine conflict with each other, because the slightly different formulations used by those courts would not necessarily lead to different results in any given case. Indeed, many of those courts have used different formulations interchangeably—even in the course of a single opinion. See, *e.g.*, *Noble* v. *Brinker Int'l, Inc.*, 391 F.3d 715, 723 (6th Cir. 2004) (stating that the determinative question is whether the plaintiff submitted evidence that the subordinate employee's bias "was a cause of the termination," or, "[i]n other words," whether the employee's bias "somehow influenced" the ultimate decisionmaker) (quoting *Wilson*, 952 F.2d at 946), cert. denied, 126 S. Ct. 353 (2005); *Russell* v. *McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (framing the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker," but "look[ing] to who actually made the decision or caused the decision to be made"); *Shager* v. *Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge," but proceeding to assess whether the adverse employment action was "tainted" or "influenced" by the subordinate's prejudice).

2. As petitioner contends (Pet. 12-14), the decisions of the majority of courts of appeals do conflict with the

Fourth Circuit's decision in *Hill* v. *Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (2004) (en banc), cert. dismissed, 543 U.S. 1132 (2005). In *Hill*, the Fourth Circuit expressly refused to construe Title VII (or the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*) to "allow a biased subordinate who has no supervisory or disciplinary authority and who does not make the final * * * decision to become a decisionmaker simply because he had a substantial influence on the ultimate decision or because he has played a role, even a significant one, in the * * * decision." *Hill*, 354 F.3d at 291. Instead, stating that it was "guided by agency principles," *id.* at 287, the Fourth Circuit held that, in order to pursue a claim of subordinate-bias liability, the plaintiff "must come forward with sufficient evidence that the subordinate employee possessed such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer." *Id.* at 291.*

Since the Fourth Circuit's decision in *Hill*, two courts of appeals (including the court below) have expressly rejected the Fourth Circuit's standard. See Pet. App. 20a-21a; *Lust* v. *Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004). That conflict might warrant this Court's review in an appropriate case in which the choice between the Fourth Circuit's standard for subordinate-bias liability and the standard of another court of appeals would clearly be outcome-dispositive.

3. This case, however, would constitute a poor vehicle for addressing any conflict because it arises in an

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* After the plaintiff in *Hill* petitioned for certiorari, this Court invited the Solicitor General to file a brief expressing the views of the United States. 542 U.S. 935. Before the Solicitor General filed his brief, however, the petition was dismissed pursuant to Rule 46.1. 543 U.S. 1132.

interlocutory posture. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). The interlocutory posture of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition).

The court of appeals reversed the district court's decision to grant summary judgment to petitioner and remanded for trial. Pet. App. 31a. In doing so, the court of appeals determined only that respondent had created a genuine issue of fact as to (1) whether Grado was racially biased and (2) whether there was a sufficient causal connection between Grado's bias and Peters' termination. *Id.* at 26a. Although respondent believes that the evidence supports this enforcement action, the jury could disagree and conclude at trial either that Grado was not racially biased or that there was an insufficient causal connection between the bias and the termination. It is clear, moreover, that petitioner intends to advance both of those arguments on remand. See, *e.g.*, Pet. 2-4.

Should the jury agree with petitioner on either point, there would be nothing for this Court to review, because respondent would lose under any liability standard. On the other hand, should the jury find in favor of respondent, and should judgment be entered for respondent and affirmed on appeal, petitioner can seek this Court's review on the question presented (and any other questions) in a subsequent petition. Such a petition, if filed, would present the Court with a fully developed factual record that would better enable the Court to assess

whether the asserted circuit conflict is implicated by this case, and, if so, whether further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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